



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: AAA Roofing Company Inc.

File: B-240852

Date: December 12, 1990

Robert F. Huntington for the protester.
Lt. Col. William J. Holland, Department of the Air Force, for
the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Bid was properly rejected as nonresponsive where it contained a standard form with terms and conditions which took exception to a material requirement of the solicitation and limited the protester's liability to the government under the contract.
2. Protest challenging an alleged impropriety apparent from the face of a solicitation is untimely where filed after bid opening.
3. A nonresponsive bid must be rejected and may not be changed or corrected based on explanations offered by the bidder after bid opening; the importance of maintaining the integrity of the competitive bidding system outweighs the possibility that the government might realize monetary savings if a material deficiency in a bid is corrected or waived.

DECISION

AAA Roofing Company Inc. protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. F12617-90-B-0024, issued by the Department of the Air Force for replacing the hospital roof at Grissom Air Force Base, Indiana. The Air Force rejected the protester's bid because AAA submitted with its bid a form with terms and conditions that took exception to a material requirement of the IFB and limited the protester's liability to the government.

We deny the protest.

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The IFB was issued on June 29, 1990. The Air Force received 12 bids by the July 31 bid opening date; AAA submitted the apparent low bid. By letter dated August 2, the contracting officer rejected the protester's bid because AAA submitted with its bid a form ("ATTACHMENT A") with terms that took exception to material requirements of the IFB. Because "ATTACHMENT A" qualified the bid, the agency determined that AAA's bid was nonresponsive as it imposed limitations on AAA's future liability to the government. See Federal Acquisition Regulation (FAR) § 14.404-2(d). By letters dated August 6 and August 8, AAA filed an agency-level protest, which the agency denied on August 16. This protest followed.

"ATTACHMENT A" consists of an introductory paragraph followed by four numbered paragraphs setting forth terms and conditions applicable to the identification, handling, and disposal of asbestos or other hazardous materials. The form states in part:

"ATTACHMENT A IS A LEGAL AND INTEGRAL PART OF ALL CONTRACTS, ORDERS AND JOBS THAT ARE KNOWN TO OR MAY CONTAIN ASBESTOS AND/OR OTHER HAZARDOUS MATERIALS. EFFECTIVE 10 APRIL 1990 (SUPERCEDES 15 MAY 1988 'ATTACHMENT A' ISSUE.)

"1. THE AAA ROOFING COMPANY, INC., DOES NOT REPRESENT ITSELF AS A HAZARDOUS MATERIALS EXPERT, CONSULTANT OR AUTHORITY. HOWEVER, WE ARE ABLE AND PREPARED TO PURSUE REMOVAL OF ROOFING PRODUCTS THAT CONTAIN ASBESTOS AND/OR OTHER HAZARDOUS MATERIALS, IF THE HAZARD IS IDENTIFIED, PROPER SPECIFICATIONS PREPARED AND OWNERSHIP OF THE HAZARDOUS MATERIALS ACKNOWLEDGED AND ACCEPTED BY THE OWNER (CUSTOMER). FURTHER, THE COST OF PREPARATION, REMOVAL, TRANSPORT AND DISPOSAL OF ANY HAZARDOUS MATERIALS IS IN ADDITION TO ANY QUOTED 'NORMAL' JOB (WHICH IS A JOB THAT DOES NOT CONTAIN HAZARDOUS MATERIALS) COST."

Paragraph 2 of the form specifies steps AAA will take upon being ordered to remove hazardous materials by the agency, including engaging an "independent hazardous materials consultant to conduct a three-day monitoring program" of the work site, and states that the consultant's report "will determine the path for completion" of the work required by the IFB; paragraph 3 states that the agency "agrees to indemnify, defend and hold harmless [AAA] . . . from and against any and all liability . . . arising out of or relating to the presence of asbestos" at the work site; paragraph 4 provides that AAA will stop work immediately upon the identification of hazardous materials, "regardless of the status of the roof project," and further states that the agency "is liable for

all additional costs . . . [for] attempts to seal the roof area," and for any additional work. The form is printed on AAA's letterhead and is signed by AAA's president.

We find that AAA's bid was properly rejected as nonresponsive because it took exception to material requirements of the IFB. A responsive bid is one that on its face is an offer to perform, without exception, the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor in accordance with the material terms and conditions of the solicitation. See FAR § 14.301(a); Mobile Drilling Co., Inc., B-216989, Feb. 14, 1985, 85-1 CPD ¶ 199. Moreover, the contracting agency is required to reject a bid which attempts to impose conditions that modify the requirements of the IFB or limit the bidder's liability to the government. FAR § 14.404-2(d).

Here, the IFB contained the standard "Differing Site Conditions" clause, FAR § 52.236-2, which requires the contractor to notify the contracting officer in writing when site conditions differ materially from those indicated in the contract. The clause provides for the contracting officer to inspect the site when so notified, FAR § 52.236-2(a), and entitles the successful contractor to an equitable adjustment in the event site conditions are materially different from those identified in the contract and result in additional costs to the contractor. The clause further provides for a written modification to the contract where appropriate. FAR § 52.236-2(b).

The IFB thus obligated the successful bidder to perform in accordance with the provisions of FAR § 52.236-2 in the event site conditions are materially different from those identified in the IFB. By conditioning its performance on the terms of "ATTACHMENT A," however, AAA's bid took exception to the obligations imposed by FAR § 52.236-2, and placed limitations on its liability to the government. Since AAA's bid did not represent an unequivocal agreement to the material terms of the IFB, the agency correctly rejected AAA's bid as nonresponsive.

AAA asserts that "ATTACHMENT A" does not impose conditions modifying the requirements of the IFB or limit its liability to the government, but merely sets forth procedures for handling hazardous materials as required by "EPA, OSHA and IOSHA" regulations, in the event such materials are found at the work site. AAA essentially argues that by omitting references to the handling of hazardous materials in the solicitation, the Air Force improperly failed to comply with existing hazardous materials guidelines. AAA concludes that the agency improperly rejected its bid simply because it